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UNRAVELLING THE EMERGENCE OF RIGHT TO BE FORGOTTEN IN INDIA

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I. ABSTRACT

The right to be forgotten is a concept that has emerged as a consequence of the befitting challenges posed by the perpetual availability of personal information on digital platforms. With the evolution of technology at such a swift pace, it has become very difficult to control personal data and protect our privacy. The right to be forgotten recognises the need to have control over our personal information by entitling us to remove or erase it from online platforms. With the help of this Article, we will attempt to examine the emergence of the right to be forgotten in India. This article includes several sub-headings, starting with the introduction and enlightening on, how the emergence of the internet has affected our rights. Further moving on, we would get to know about the definition and origin of the right to be forgotten. This article would also deal with the status of other countries along with that of India vis-à-vis this right. While coming to the closure of the article, the readers would get to know about some of the consequential challenges pertaining to the proper implementation of the right, and finally, the Conclusion along with the Author's views on the topic, where this article would sum up, providing suggestions for the improvement of the implementation of this sui-generis right.

II. KEYWORDS

Right to be forgotten, personal data, privacy, online, erasure

III. INTRODUCTION

In this era of the Internet of Things (IoT), where the slightest of information can go viral in just a few seconds, concerns related to violation of privacy have quadrupled, causing immense damage to the dignity of a person. Therefore, the need for robust provisions have become imperative in order to safeguard an individual's right to

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privacy and dignity and to foster the democratic character of the country, as rightly observed by Justice Sanjay Kishan Kaul in *K.S. Puttaswamy vs Union of India*[2] *(2017)*- "*Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision-making processes and shaping behavior. It can be used as a tool to exercise control over us like the "big brother" State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford."*

In 2010, the idea of the *le droit à l'oubli (*the right to be forgotten) originated in France, which recognised the right of the ex-convicts to remove their names from the official documents since the data related to them became "outdated". It allows individuals to start afresh with their lives without bearing the burden of their past.[3]

Having said that, it is also important to note that a delicate balance needs to be established between other fundamental rights, for instance, freedom of speech and expression, the right to information, right to press, and the right to dissent that play an important role in safeguarding the democratic character of a country.

IV. WHAT IS THE RIGHT TO BE FORGOTTEN?

The right to be forgotten or right to erasure gives data subjects[4] the right to have their personal information deleted by the data fiduciaries that has been posted online, on the ground that a) the content is no longer relevant for the purpose that it was created;[5] b) the data subject withdraws his consent;[6] c) the data subject objects to the processing of the data;[7]d) personal data has been unlawfully processed;[8] e)the personal data have to be erased for compliance with a legal obligation in Union or Member State law to

[2]*K.S. Puttaswamy vs Union of India*, (2017) 10 SCC 1.
[3]Charles Arthur, Explaining the 'right to be forgotten' – the newest cultural shibboleth, THE GUARDIAN (May 4 ,2014)<https://www.theguardian.com/technology/2014/may/14/explainer-right-to-be-forgotten-the-newest-cultural-shibboleth>(Last visited on July 7, 2023).
[4] GDPR, Article 4(1).
[5] GDPR., Article 17(1)(a).
[6] GDPR, Article 17(1)(b).
[7] GDPR, Article 17(1)(c).
[8] GDPR, Article 17(1)(d).

which the controller is subject;[9] *et al.* This right recognizes an individual's control over the information appertaining to them.

V. ORIGIN OF THE RIGHT TO BE FORGOTTEN

The right to be forgotten or the right to erasure, at the present stage, is in a nebulous stage and is still evolving in international and national jurisprudence. It came into the limelight in 2014 in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*[10]. It involved a Spanish citizen, Mario Costeja Gonzalez, as the petitioner seeking the erasure of online information appertaining to the 1998 auction notice of his home, which was filed against a Spanish newspaper (La Vanguardia), Google Spain SL, and Google Inc.[11] It was argued that the proceedings were fully discharged, and therefore, the aforementioned notice was an irrelevant and unnecessary invasion of his privacy and dignity. The Court of Justice of the European Union (CJEU), considering the 1995 Data Protection Directive[12] averred that Google, being the data controller,[13] must delete links to personal data from search results upon the request of the data subject if it does not harm the public interest.[14] The Court also recognised Gonzalez's right to be forgotten and stated that the data controller is bound to remove any "*inadequate, irrelevant or no longer relevant or excessive*" data to which the data subject objects.[15]

Subsequently, in 2018, the European Union adopted the General Data Protection Regulation (GDPR). As per Article 17, the GDPR outlines the specific circumstances under which the right to be forgotten applies. An individual has the right to have their personal data erased if-[16] "

[9] GDPR, Article 17(1)(e).
[10] *Google Spain SL v. Mario Costeja González*, (2014) C-131/12.
[11]Google Spain SL v. Agencia Española de Protección de Datos, HARV.L.REV. (2014),<https://harvardlawreview.org/print/vol-128/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos/#footnote-13> (last visited 6 July, 2023).
[12] Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).
[13]Council Directive, art. 2(d).
[14] *Supra* note 10.
15Supra note 10.
[16] Ben Wolford, Everything you need to know about the "Right to be forgotten", GDPR Compliance<https://gdpr.eu/right-to-be-forgotten/ > (last visited on 6 July, 2023).

- The personal data is no longer necessary for the purpose an organization originally collected or processed it.
- An organization is relying on an individual's consent as the lawful basis for processing the data and that individual withdraws their consent.
- An organization is relying on legitimate interests as its justification for processing an individual's data, the individual objects to this processing, and there is no overriding legitimate interest for the organization to continue with the processing.
- An organization is processing personal data for direct marketing purposes and the individual objects to this processing.
- An organization processed an individual's personal data unlawfully.
- An organization must erase personal data in order to comply with a legal ruling or obligation.
- An organization has processed a child's personal data to offer their information society services."

However, an organization's right to process someone's data might override their right to be forgotten. Here are the reasons cited in the GDPR that trump the right to erasure:[17]"

1. The data is being used to exercise the right of freedom of expression and information.
2. The data is being used to comply with a legal ruling or obligation.
3. The data is being used to perform a task that is being carried out in the public interest or when exercising an organization's official authority.
4. The data being processed is necessary for public health purposes and serves in the public interest.

[17] *Id.*

5. The data being processed is necessary to perform preventative or occupational medicine. This only applies when the data is being processed by a health professional who is subject to a legal obligation of professional secrecy.
6. The data represents important information that serves the public interest, scientific research, historical research, or statistical purposes and where erasure of the data would likely to impair or halt progress towards the achievement that was the goal of the processing.
7. The data is being used for the establishment of a legal defense or in the exercise of other legal claims."

VI. STAND OF OTHER COUNTRIES

1. **Argentina:** In 1994, Argentina adopted the constitution, which recognised an individual's right to have any personal data be removed that violates his privacy and dignity.[18] The Argentine version is called 'amparo' and is spelled out in Section 43 of the Argentine Constitution: "*Any person shall file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data.*"[19] As compared to other Latin countries, the Argentine version of the right to be forgotten is called "the most complete" because it guarantees an individual's right to correct, suppress, or update the information about oneself that has been held by the government. It also allows an individual to declare their personal information confidential.[20] It is important to note that the Argentine amparo contains an exception for news reporting by journalists[21], recognising the freedom of speech and expression.
2. **USA:** Currently, the USA does not has any statute to deal with the right to be forgotten. It is contended that it might have a perilous effect on the freedom of

[18]Edward L. Carter, Argentina's Right to be Forgott*en*, EMORY INT'L L. REV. 23(2013) <https://scholarlycommons.law.emory.edu/eilr/vol27/iss1/3> (last visited on July 6, 2023).
[19] Argentine Constitution, § 43.
[20] *Supra* note 17.
[21] *Id.*

speech and expression of its subjects. In 2017, a bill was proposed in the US Senate demanding the recognition of an individual's right to be forgotten. The bill was subsequently withdrawn because of its vague nature.[22] It was also found to be unconstitutional as it was against the First Amendment law, which guarantees the freedom of speech, the press, assembly, and the right to petition the government for the redress of grievances.[23]

3. **Russia:** In 2015, the "Right to Be Forgotten" Bill was introduced in the Russian Parliament (Duma). It came into force in 2016, recognising Russian citizens' right to have their personal data removed, if it is, inaccurate, out of date, or irrelevant because of certain circumstances or actions taken by the citizens. Though the law is largely based on the Google Spain case, it has failed to take into account the relevant provisions to protect freedom of speech and expression.

VII. TAKE OF INDIA VIS-À-VIS RIGHT TO BE FORGOTTEN

In India, at the present stage, there is no concrete law relating to the right to be forgotten. It is gradually evolving. The Supreme Court of India in the case of *K.S.Puttaswamy vs. Union of India*[24] *(2017)* recognised the 'right to be forgotten' as part and parcel of an individual's privacy as enshrined in Article 21. The honorable court averred that the 'right to be forgotten was subject to restrictions, and this right could not be used if it was required for the[25]-"

1. Exercise of the Right to freedom of expression and information;
2. Fulfilment of legal responsibilities;
3. Execution of a duty in the public interest or public health;

[22] Eugene Volokh, N.Y. bill would require people to remove 'inaccurate,' 'irrelevant,' 'inadequate' or 'excessive' statements about others, The Washington Post(15th March, 2017) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/15/n-y-bill-would-require-people-to-remove-inaccurate-irrelevant-inadequate-or-excessive-statements-about-others/> (last visited 6 July, 2023).

[23]The Bill of Rights: A Transcription <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i-2> (last visited 6 July, 2023).

[24]*Supra* note 1.

[25]Sanjay Vashishtha, The Evolution of Right to be Forgotten in India, SCC Blog (2022)<https://www.scconline.com/blog/post/2022/01/27/the-evolution-of-right-to-be-forgotten-in-india/>(last visited 6 July, 2023).

4. Protection of information in the public interest;
5. For the purpose of scientific or historical study, or for statistical purposes; or
6. The establishment, execution, or defence of legal claims."

In *Jorawar Singh Mundy v. Union of India*[26], the petitioner was earlier accused in a different case under the Narcotic-Drugs and Psychotropic Substances Act, 1985, and later got acquitted. He wanted those judgements to be removed from the online platforms of Google, Indian Kanoon, and vLex.in claiming that they had caused immense damage to his professional life. The Court directed the removal of the concerned judgement in order to safeguard the individual's right to privacy under Article 21.

In another case, *Dharmaraj Bhanushankr Dave v. State of Gujarat*[27], the petitioner was charged with various provisions related to criminal law including murder and criminal conspiracy. The petitioner had claimed that since he was acquitted in the case, the judgement of the concerned case should not be published on the internet because it could threaten his personal and professional life, violating his right to privacy under Article 21. However, the court did not accede to the petitioner's claim and declared that the petitioner's claim of demanding the 'right to be forgotten' in the concerned case was infructuous.

In Delhi High Court in *Zulfiqar Ahman Khan v. M/S Quintillion Business Media*[28], the petitioner sought the removal of two defamatory articles concerning #MeToo allegations against the petitioner on TheQuint media platform. The court took cognizance of the petitioner's 'right to be forgotten' and 'right to be left alone' as envisaged in Article 21 and directed the media company to take down the articles and to forbid any subsequent republishing of the same.

In Karnataka High Court in the case of *{Name Redacted} vs. Registrar General*[29], a writ petition was filed under Article 226 of the Constitution, pleading for the removal of

[26] *Jorawar Singh Mundy v. Union of India*, W.P. (C) 3918/ 2020.
[27] *Dharmaraj Bhanushankr Dave v. State of Gujarat,* 2017 SCC OnLine Guj 2493.
[28] *Zulfiqar Ahman Khan v. M/S Quintillion Business Media,* CS(OS) 642/2018.
[29] *{Name Redacted} vs. Registrar General*, (2017) Writ Petition No. 62038 of 2016.

the petitioner's daughter's name from the case title, citing that it was causing immense harm to her personal and professional life. The Court ordered the removal of her name and held, "*This would be in line with the trend in the Western countries where they follow this as a matter of rule "Right to be forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.*"[30]

In *Subhranshu Rout v. State of Odisha,*[31] the Orissa High Court recognised the 'right to be forgotten' as a remedy for the victims of revenge porn and held that "..information in the public domain is like toothpaste, once it is out of the tube one can't get it back in and once the information is in the public domain it will never go away". The court observed the need for a full-fledged law in order to critically assess the privacy concerns of the citizens.

VIII. The Digital Data Protection Bill, 2022

The Digital Personal Data Protection Bill, 2022, which has been recently approved by the Parliament, recognises the data principal's rights to information about personal data, correction and erasure of personal data, grievance redressal, and the right to nominate.

Section 13 of the Bill pertaining to the right to correction and erasure of personal data states that[32]- "

(1)A Data Principal shall have the right to correction and erasure of her personal data, in accordance with the applicable laws and in such manner as may be prescribed.

(2) A Data Fiduciary shall, upon receiving a request for such correction and erasure from a Data Principal:

(a) correct a Data Principal's inaccurate or misleading personal data;

(b) complete a Data Principal's incomplete personal data;

(c) update a Data Principal's personal data;

[30] *Id.*
[31] *Subhranshu Rout v. State of Odisha,* (2020) BLAPL No.4592/2020.
[32] Digital Data Protection Bill, 2022, § 13.

(d) erase the personal data of a Data Principal that is no longer necessary for the purpose for which it was processed unless retention is necessary for a legal purpose."

The applicability of the right to be forgotten can be decided as per the following factors:[33]

- the sensitivity of the personal data to be restricted,
- the relevance of the personal data to the public, and
- the role of the data principal in public life.

Section 18 of the Bill provides for exemptions in the cases where the processing of the data is necessary[34]: "

- to enforce any legal right or claim;
- to perform any judicial or quasi-judicial function by any court, tribunal or any other body in India;
- for the prevention, detection, investigation, or prosecution of any offence or violation of any law;
- where personal data of the data principal is processed outside the territory of India in case of a contract entered into by a person based in India with any person outside the territory of India;

Further, the central government may exempt the processing of personal data:[35]

a) by any instrumentality of the State in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence relating to any of these; and

[33]"Digital Data Protection Bill, 2022", PRS India (2022) <https://prsindia.org/billtrack/draft-the-digital-personal-data-protection-bill-2022 > (last visited 6 July, 2023).
[34] Digital Data Protection Bill, 2022, § 18.
[35] *Id*.

b) necessary for research, archiving or statistical purposes if the personal data is not to be used to take any decision specific to a Data Principal and such processing is carried on in accordance with standards specified by the Board."

The Bill also contains provisions for the establishment of the Data Protection Board of India, whose major function includes the allocation of work, receipt of complaints, formation of groups for hearing, and pronouncement of decisions.

IX. CHALLENGES IN THE IMPLEMENTATION OF THE RIGHT TO BE FORGOTTEN

1. **The hurdle of balancing out privacy and Article 19**: The right to freedom of speech and expression is envisaged in Article 19(1)(a) of the Indian Constitution. In certain circumstances, it may happen that the right to privacy and freedom of speech and expression might get into conflict with each other, thereby jeopardising the relationship between the two. There can be certain instances where it might be used for political purposes. For example, An article is published on the news website about a person 'A' who is a public figure, related to his personal and professional life. Prompted by this, 'A' files a case against the digital platform claiming the removal of such information while contending it to be against his privacy. This conflict of rights reflects that RTBF could have a debilitating effect on freedom of speech and expression.
2. **Lack of standard statutes:** Currently, there is still no full-fledged, unambiguous law that defines the scope and limits of the 'right to be forgotten'. There is a need to abate the dubiousness surrounding the legal aspect of the right to be forgotten by defining and restricting its scope.
3. **Transferring excessive power to Private Entities:** Private bodies are profit-making entities, and entrusting them the power to enforce fundamental rights, i.e., the right to be forgotten, the right to privacy, and freedom of speech and expression might be perilous. This is because of the liability that might arise as a consequence of their non-compliance with the provisions of the law. As a

result, this could entail widespread censorship, which might, in turn, affect the right to dissent under Article 19(1)(a).

4. **Technical challenges:** There is a huge difference in the functioning of human and machine memory. While the human brain is prone to forgetting, the latter works on certain algorithms through which it is capable of retrieving the data.[36]It would be very difficult to implement the right to be forgotten because of the technical difficulties associated with the processing of removal requests. This would pose quite a challenge for the data fiduciaries, especially the big ones, to manage vast amounts of data in order to process the removal requests accurately and efficiently while maintaining ethical and legal concerns.

X. CONCLUSION AND SUGGESTIONS

In this digital era where data is considered a currency, the right to be forgotten has emerged as a crucial mechanism for controlling privacy misuse. The humongous amount of personal information collected, stored, and shared on digital platforms posits concern about the long-term consequences of an individual's digital footprints. Therein, the right to be forgotten or the right to erasure comes to the rescue, which empowers an individual to remove their personal information from digital platforms. It acknowledges an individual's control over his personal data and prevents the potential misuse of the same.

However, the implementation of the right to be forgotten comes with several challenges. There is a pressing need to balance it with other fundamental rights such as the right to information, right to press, and freedom of speech and expression, which requires the intervention of the legislature and judiciary. Additionally, there should be the establishment of an independent adjudicatory authority that could guarantee independence, transparency, and impartiality while deciding cases pertaining to right to privacy and/or freedom of speech and expression.

[36] Tiffany Li, Eduard Fosch Villaronga & Peter Kieseberg, Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten (2018) COMPUTER LAW & SECURITY REVIEW <https://scholarship.law.bu.edu/faculty_scholarship/817> (last visited on 7 July, 2023).

There is also a need to promote interdisciplinary research and collaboration between technologists, lawyers, and policymakers. This would turn out to be a befitting panacea to address the issues posed by the digital landscape and would foster effective implementation of the 'right to be forgotten'.

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